

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF TEACHING**

In the Matter of the Proposed Rule
Governing Paraprofessional
Credentialing, Minnesota Rules
Chapter 8710

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Kathleen D. Sheehy was assigned to this matter concerning the proposed adoption of rules by the Minnesota Board of Teaching. These rules govern the creation of a system of paraprofessional credentialing. A public hearing regarding these rules was held on March 12, 2008, commencing at 8:30 a.m. in Room 14, Conference Center A of the Minnesota Department of Education (MDE), 1500 Highway 36 West, Roseville, Minnesota.¹ The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act. The Legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency made after the proposed rules were initially published are not impermissible substantial changes. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Bernard Johnson, Assistant Attorney General, appeared at the rule hearing on behalf of the Board. The members of the Board's hearing panel were Karen Balmer, Executive Secretary of the Board; and Trudy Hervey from the Minnesota Department of Education (MDE). The Board sponsored testimony in support of the rule from Richard Herriges, Education Minnesota; Teri Wallace, University of Minnesota; Barbara Jo Stahl; Mary DeLuney, Special School District No. 1; and Robert Schrank, Senior Field Representative for the Minnesota

¹ Administrative Law Judge Steve M. Mihalchick conducted the rule hearing.

School Employees Association. Approximately 25 members of the public attended the hearing in Roseville on March 12, 2008.

The Board and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. After the hearing, the record remained open for seven calendar days (until March 19, 2008) to allow interested persons and the Board an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the Board the opportunity to file written responses to the comments received during the initial period. The hearing record closed for all purposes on March 26, 2008.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background and Nature of the Proposed Rules

1. Minnesota schools provide a variety of services to students through education paraprofessionals. These staff members are not licensed teachers; they provide services as assistants to licensed teachers.

2. The Board began rulemaking in this area in 2003, when the Minnesota Legislature enacted Minn. Stat. § 120B.363. That statute directed the Board of Teaching to adopt rules for a paraprofessional credential. The Board began the rulemaking process, but encountered both a change in leadership priorities and an issue regarding the Board's ability to charge a fee for the credential. The Board did not propose a rule in this area based on the 2003 statutory authorization.²

3. In 2007, the Legislature inquired of the Board regarding the prior rulemaking process. The Legislature directed that the Board adopt a rule governing paraprofessional credentialing. The legislation referred back to the 2003 statute, exempted this rulemaking from the statutory expiration of rulemaking authority, set a January 1, 2008, deadline for a notice of hearing, and included authorization for the Board to charge a fee for issuing the credential.³

4. In response to the legislation, the Board convened the Paraprofessional Credential Working Group (Working Group) to develop suitable rule language. The Working Group was comprised of the Board's four staff members, five staff members from MDE, two representatives from Education Minnesota (the primary teachers' union), one representative from the Minnesota

² Board Presentation; Ex. II.

³ 2007 Minn. Laws Chap. 146, Art. 2, Sec.34.

State Colleges and Universities (MnSCU), and one representative from the University of Minnesota.⁴

5. The Working Group reviewed the previous work done toward adopting a credentialing rule and noted that the previous draft rules were controversial. The Working Group determined that clarity with regard to the purpose of the credential was an important goal. Paraprofessionals in some federally-funded programs must meet requirements under federal law (particularly P.L. 107-110, known as “No Child Left Behind” or NCLB). The Working Group also noted that school districts and charter schools employing paraprofessionals have statutory obligations to train paraprofessionals under Minn. Stat. § 120B.363, subd. 3 (2006). The Working Group focused on clearly articulating the role of the credential in light of existing requirements. To that end, the Working Group developed the Professional Trajectory for Minnesota Paraprofessionals (Trajectory).⁵

6. The Trajectory suggests that the requirements of NCLB for Title I and special education paraprofessionals set the minimum requirements for entry into the profession and that the certification credential is intended to recognize voluntary professional development achieved after meeting these minimum requirements.⁶ From this starting point, the Working Group went on to develop the draft language of the rule. The Working Group believed the draft rule language was “a reasonable response to the legislation, that it would serve as a meaningful tool for paraprofessionals, and that it may encourage paraprofessionals to seek additional training for the critical roles that they play in the lives of our students.”⁷

7. Lori Fildes, Director of Special Services for Wayzata Public Schools (Wayzata), was critical of the Working Group process, stating:

First of all, I am concerned that the process for proposing the rule was inherently flawed. Page two of the SONAR under the heading of “Process” states that the Board of Teaching convened a group of stakeholders in September 2007, to collaborate on a new rule. The stakeholders invited to participate on this group included Education Minnesota, MN Board of Teaching, MN Department of Education, and the University of Minnesota, Twin Cities. The Board of Teaching did not include representatives from local education

⁴ Ex. II, Attachment B.

⁵ Board Presentation; Ex. II (the previous draft rule is Attachment C; the Trajectory is Attachment D).

⁶ *Id.* As many commenters pointed out, NCLB requirements do not apply to all paraprofessionals or even to all special education paraprofessionals. During the hearing, the Board acknowledged its error in characterizing the NCLB requirements as setting minimum requirements for special education paraprofessionals. This issue is discussed in more detail in the regulatory analysis of the rule.

⁷ *Id.*

agencies such as principals, directors of special education, directors of federal programs, human resource directors, or teachers. These are the professionals that would be expected to implement this new rule and they were unable to provide meaningful input because they were not included in the stakeholders group. I would assume that local districts would have a large stake in the creation of any rule that requires local school district implementation. I am gravely concerned that as the special education director representative to the Paraprofessional Consortium, my organization was not included as a member of the stakeholders group. I was given an opportunity to learn about the proposed rule after it had already been developed through a general Paraprofessional Consortium meeting.⁸

8. The Board acknowledged that the Working Group was not assembled with a great deal of outreach to interested parties. The Board noted that it was required to meet a difficult deadline to initiate this proceeding.⁹ While the Board could have broadened the Working Group (especially considering that the proposed rule requires school districts to develop the process for assessing the competence of paraprofessionals), the Board is not required to assemble a Working Group, and the exclusion of some interested parties from that group does not constitute a procedural defect in these rules.

9. In this rulemaking proceeding, the Board proposes a new rule provision, Minnesota Rule Chapter 8710.9000. The proposed rule obligates the Board to grant a credential to applicants meeting the requirements of the rules. The proposed rule requires a paraprofessional to demonstrate competence in nine areas and to pass a state-approved examination. The rules propose that school districts develop the process to assess the competence of paraprofessionals in the nine required areas, subject to approval by the Department of Education. School districts may develop this process either individually or in groups. Upon completion of the locally developed and state-approved process, an applicant for the credential must submit an application and processing fee to the Board of Teaching.

II. Compliance with Procedural Rulemaking Requirements

10. On October 1, 2007, the Board filed with the Chief Administrative Law Judge a proposed request for comments that was intended for publication. The Board also filed its additional notice plan for the request for comments and requested that the plan be approved pursuant to Minn. R. 1400.2060.¹⁰

11. On October 8, 2007, the Board published in the State Register a Request for Comments seeking information regarding the anticipated

⁸ Posthearing Comment No. 21 (Wayzata); *see also* Posthearing Comment No. 13 (St. Cloud).

⁹ Testimony of Karen Balmer.

¹⁰ Ex. E.

credentialing rule. The notice indicated that the Board did not yet have a provisional draft of the possible rule.¹¹ The request for comments was mailed to persons and groups who have expressed interest in past Board rulemakings.¹² The request for comments was also posted on the Board's website and the website of the Paraprofessional Consortium.¹³

12. By letter dated October 22, 2007, Administrative Law Judge Beverly Jones Heydinger approved the additional notice plan.¹⁴

13. On December 18, 2007, the Board filed copies of the proposed Notice of Hearing, the proposed rules, and a draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings.¹⁵ The filings complied with Minn. R. 1400.2080, subp. 5 (2005).

14. As required by Minn. Stat. § 14.131, the Department asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government. The Department of Finance provided comments in a memorandum dated December 14, 2007.¹⁶

15. On December 31, 2007, the Board mailed the Dual Notice in this rulemaking proceeding to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.¹⁷ The Notice identified the date and location for the hearing in this matter, should a sufficient number of requests for hearing be received.¹⁸

16. At the hearing on March 12, 2008, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Board's Request for Comments as published in the *State Register* on October 8, 2007;¹⁹
- b. the proposed rules dated December 12, 2007, including the Revisor's approval;²⁰
- c. the Agency's Statement of Need and Reasonableness (SONAR);²¹

¹¹ 32 S.R. 671 (October 8, 2007); Ex. G.

¹² Ex. H.

¹³ Exs. I and J.

¹⁴ Ex. K.

¹⁵ Ex. U.

¹⁶ Ex. R.

¹⁷ Ex. AA.

¹⁸ Ex. Y.

¹⁹ Ex. G.

²⁰ Ex. U.

²¹ *Id.*

- d. the certification that the Board mailed a copy of the SONAR to the Legislative Reference Library on March 8, 2008;²²
- e. the Notice of Hearing as published in the *State Register* on December 31, 2007;²³
- f. Certificates of Mailing a Dual Notice of Hearing to the rulemaking mailing list and to the parties identified in the Additional Notice Plan on December 31, 2007, and the mailing lists used as of that date;²⁴
- g. a Certificate of Mailing the Dual Notice of Hearing to the Chairs of the Legislative Committees of Education Policy and Finance on December 31, 2007;²⁵
- h. the written comments on the proposed rule that the Board received during the comment period that followed the notice of hearing;²⁶
- i. a list of members in the Working Group who participated in developing the proposed rule language;²⁷ and
- j. a list of the witnesses called by the agency to testify on behalf of the proposed rule.²⁸

III. Statutory Authority

17. When NCLB was adopted in 2001, it required school districts receiving Title I funds to ensure that all paraprofessionals hired after the date of enactment who work in a program supported by Title I funds shall have (A) completed at least two years of study at an institution of higher education; (B) obtained an associate's (or higher) degree; or (C) met a rigorous standard of quality and can demonstrate, through a formal State or local academic assessment, (i) knowledge of, and the ability to assist in instructing reading, writing, and mathematics; or (ii) knowledge of, and the ability to assist in instructing reading readiness, writing readiness, and mathematics readiness, as appropriate. The Act explicitly provided that receipt of a secondary school diploma or its equivalent was necessary but not sufficient to satisfy the standards of any state or local assessment. It required school districts to ensure that paraprofessionals employed by school districts working in programs supported

²² Ex. GG.

²³ Ex. Y.

²⁴ Ex. AA.

²⁵ Ex. AA.

²⁶ Exs. CC and DD.

²⁷ Ex. II, Attachment B.

²⁸ Ex. HH.

by Title I funds at the time the Act was passed would meet these same requirements no later than four years after the date of enactment.²⁹

18. In 2003, the legislature adopted Minn. Stat. § 120B.363, subd. 1, which provides:

Subdivision 1. [RULEMAKING.] The board of teaching must adopt rules to implement a statewide credential for education paraprofessionals who assist a licensed teacher in providing student instruction. *Any paraprofessional holding this credential or working in a local school district after meeting a state-approved local assessment is considered to be highly qualified under federal law. Under this subdivision, the board of teaching, in consultation with the commissioner, must adopt qualitative criteria for approving local assessments that include an evaluation of a paraprofessional's knowledge of reading, writing, and math and the paraprofessional's ability to assist in the instruction of reading, writing, and math.* The commissioner must approve or disapprove local assessments using these criteria. The commissioner must make the criteria available to the public.³⁰

19. In addition, the Board cites 2007 Minnesota Laws, Chapter 146, Article 2, Section 34, as authority for adopting these rules. That provision states:

Sec. 34. RULEMAKING REQUIRED.

(a) Notwithstanding the time limit in Minnesota Statutes, section 14.125, the Board of Teaching must adopt the rules it was mandated to adopt under Laws 2003, chapter 129, article 1, section 10. The board must publish a notice of intent to adopt rules or a notice of hearing for rules subject to this section before January 1, 2008.

(b) The Board of Teaching may charge fees to issue new credentials and to renew credentials for paraprofessionals issued credentials under the rules adopted under this section.³¹

20. It appears to the Administrative Law Judge that the 2003 legislation was an effort, in part, to create through rulemaking a state-approved, local assessment that would satisfy the “state or local assessment” option provided by NCLB for evaluating a paraprofessional’s knowledge of, and ability to assist in the instruction of, reading, writing, and math. As noted above, the Board commenced the process of drafting this rule in 2003, but did not initiate a rulemaking proceeding for a variety of reasons, including a lack of consensus on

²⁹ 20 U.S.C. § 6319; 34 C.F.R. § 200.58.

³⁰ Minn. Stat. § 120B.363, subd. 1 (emphasis added).

³¹ 2007 Minnesota Laws, Chapter 146, Article 2, Section 34.

the standards for issuing the credential. The comments received in this proceeding indicate that school districts have proceeded to implement the requirements of NCLB without reliance on any state-approved local assessment. And the Board has made clear that the credential proposed in this proceeding is intended to be entirely distinct from NCLB requirements. According to the SONAR, the rule proposes a voluntary credential that is not required but is intended to recognize “advanced training and skills.”³² At the hearing, the Board’s executive director stated that the requirements of NCLB “are separate from the credential,” which is intended to serve as “a meaningful recognition of professional development that a paraprofessional has voluntarily pursued.”³³

21. Based on the recommendations of the Working Group, the credential proposes to establish competency in nine areas that are considerably more broad than the instruction of “reading, writing, and math” referenced in NCLB: the competency areas include, for example, the philosophical, historical, and legal foundations of education; assessment, diagnosis, and evaluation; and communication and collaboration partnerships. The ninth competency area is “academic instructional skills in reading, writing, and mathematics.” Many commenters argued that the breadth of these competency areas far exceeds the requirements of both NCLB and the original legislation directing the Board to adopt rules. They also argue that there is no need for the rule, since districts are independently required to satisfy NCLB requirements.³⁴

22. In 2007, however, the legislature explicitly directed the Board to “adopt the rules it was mandated to adopt under Laws 2003, chapter 129, article 1, section 10.” The Board’s initial statutory authority to adopt these rules had expired under Minn. Stat. § 14.125, which requires that publication of the notice of intent to adopt rules be published not later than 18 months after the statutory grant of authority becomes effective. The 2007 session law granted an express waiver to the time limit in Minn. Stat. § 14.125 and established a new deadline, which the Board met when it published its Dual Notice. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing educational paraprofessional certification. Arguments concerning the breadth of the rule are addressed in the rule-by-rule analysis below.

IV. Additional Notice Requirements

23. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. As discussed above, the Board submitted an additional notice plan to the Office of Administrative Hearings, which was reviewed and approved by Administrative Law Judge Beverly Jones Heydinger

³² SONAR at 2.

³³ Ex. II.

³⁴ Posthearing Comment Nos. [INSERT]

on October 22, 2007. During the rulemaking proceeding, the Board certified that it provided notice to those on the rulemaking list maintained by the Board and in accordance with its additional notice plan.³⁵

24. The Board made efforts to inform and involve parties in the rulemaking including:

- Ø Individuals and groups on the Board of Teaching's Rulemaking List;
- Ø Minnesota Department of Education;
- Ø Paraprofessional organizations;
- Ø Chairs and Vice-Chairs of the Education Committees of the Minnesota Senate and Minnesota House of Representatives;
- Ø All superintendents and charter school directors: MDE Superintendent weekly email; and
- Ø the following Minnesota professional organizations related to education: Education Minnesota; Minnesota Association of Charter Schools; Minnesota School Board Association; Minnesota Association of School Administrators; Minnesota Association of Secondary School Principals; Minnesota Elementary School Principals Association; Minnesota Rural Education Association; Minnesota Human Resources Organization; Minnesota Staff Development Council; Association of Metropolitan School Districts; Schools for Equity in Education; and Minnesota Association of Colleges of Teacher Education.³⁶

25. The Board has sufficiently disseminated its proposed language for the education paraprofessional credential rules as required by Minn. Stat. §§ 14.131 and 14.23. The attendance at the public hearing and the number of written comments submitted support the conclusion that the Board provided adequate notice to interested parties.

26. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state. Because the proposed rules will not affect farming operations, the requirements of Minn. Stat. § 14.111 need not be met in this proceeding.

VI. Compliance with Other Statutory Requirements

³⁵ Ex. AA.

³⁶ SONAR at 5-6.

A. Regulatory Analysis in the SONAR

27. Minn. Stat. § 14.131 requires an agency adopting rules to include the following information in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

28. With respect to the first factor, the Board indicated in its SONAR that the proposed rules will affect Minnesota students, teachers, schools that employ paraprofessionals, and the paraprofessionals themselves.³⁷

29. With regard to the second factor, the Board maintained that the proposed rules would not create any additional costs to the Department. The Board acknowledged that the proposed rule may require an additional staff

³⁷ SONAR at 4.

member in the Educator Licensing Division of MDE to process applications. The Board maintained that “because the credential is voluntary, there is no definitive method for projecting the number of applicants that may apply.”³⁸ The Board noted that the 2007 authorizing legislation allowed the Board of Teaching to assess a fee for processing credential applications. The Board concluded that the fee revenue would offset the staff costs, so that the impact on state revenues should remain neutral.³⁹

30. Regarding the third factor, the Board asserted that there are no less costly methods for achieving the purposes of the proposed rules. The Board related that, in developing the rules, MDE and other stakeholders were consulted about costs. The Board and other stakeholders “considered carefully the costs in money, time, and resources to implement the statutory requirement....” The Board concluded that the “the least costly methods available” were chosen.⁴⁰

31. With respect to the fourth factor, MDE asserted that there are no alternatives to the proposed rules. Because the Legislature directed the Board of Teaching to adopt this rule, the Board maintains that there are no alternative methods for achieving the intended outcome. The Board did note that the proposed rule “reflects an effort to address the concerns expressed by stakeholders in the original rulemaking process” begun in 2003.⁴¹

32. With regard to the fifth regulatory factor, the Board estimated that the proposed rules would be cost neutral. The Board noted that the proposed rule will require staff time from within the Educator Licensing Division of MDE. The Board did not attempt to quantify the amount of time required for this staff work, since the proposed rule is voluntary. The Board identified the cost to the applicant as the same amount required for the teacher licensure processing fee, which is currently \$47.⁴²

33. Many commentators argued that the SONAR failed to address substantial costs that school districts will incur as a result of the proposed rule. The commentators’ cost objections fell into two fundamentally distinct categories: (1) costs related to developing the specific criteria and process for the local assessment; and (2) costs likely to arise as a consequence of having more qualified staff demanding higher pay in negotiating collective bargaining agreements.

34. Elizabeth Lodge Rogers, PhD, Director of Student Services for the Saint Cloud Area School District 742, Special Education Office (St. Cloud Area School District 742 SEO); Denny Ulmer, Executive Director of the Bemidji Regional Interdistrict Council; Candace Malm, Director of Special Education for

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 4-5.

the PAWN Special Education Cooperative (PAWN SEC); Judi Vold, Director of Special Education for the Winona Area Public Schools; Terry Bartness, Kelliher School Superintendent (Kelliher); Susan Butler, Director of Special Education for Anoka-Hennepin ISD #11 (Anoka-Hennepin); Kay Campbell, PhD, Director of the Mid-State Education District (Mid-State); Judy Coley, Director of Special Education for Buffalo-Hanover-Montrose Independent School District 877 (ISD 877) and others noted that the proposed system of competency demonstration imposed the administrative burden and expense of developing more specific criteria on local school districts.⁴³ Duane Borgeson, District Director of the Benton-Stearns Education District 6383 and the Rum River Special Education Cooperative Board (Rum River Coop) noted that voluntary programs have, in the past, become a monitoring standard that each district must meet.⁴⁴

35. Sandra Haller, Special Education Coordinator for the Sauk Rapids-Rice Public Schools; PAWN SEC; Julie Ladwig, Director of Special Education for the Waseca Area Public Schools (Waseca APS); Kelliher; Anoka-Hennepin; Mid-State; Rum River Coop; ISD 877; and others expressed concern that obtaining the credential would trigger demand for increases in compensation based on pay equity requirements.⁴⁵ These commentators argued that the Board failed to assess this cost increase as required by Minn. Stat. § 14.131.

36. Laurie Stammer, Business Representative for Service Employees International Union Local 284 (SEIU), maintained that any impact on pay equity expense would arise from the demands of the work being performed, not the existence of a credential. SEIU asserted that any school district that is committed to continuing education cannot be opposed to a voluntary system that results in improved educational services in schools.⁴⁶

37. In response to these comments, the Board maintains that all of those expenses are avoidable because the entire rule is voluntary and no school district would be obligated to develop a local process for approval by the state. In the words of the Board, a district has the option of “doing nothing” in response to the rule.⁴⁷ Robert Schrank, Senior Field Representative for the Minnesota School Employees Association, acknowledged that credentialing will be used in collective bargaining, but noted that this is the same as with any improvement in a paraprofessional’s qualifications.⁴⁸ Thomas Dooher, President of Education Minnesota, also stressed the voluntary nature of the credential as ameliorating any potential fiscal impact.⁴⁹

⁴³ Posthearing Comment Nos. 5, 6, 8, 10, 12, 13, 14, and 19.

⁴⁴ Testimony of Borgeson.

⁴⁵ Posthearing Comment Nos. 5, 6, 8, 9, 11, 14, 19, and 20.

⁴⁶ Posthearing Comment No. 1 (SEIU).

⁴⁷ Board Reply at 2.

⁴⁸ Posthearing Comment No. 2 (Minnesota School Employees Association).

⁴⁹ Posthearing Comment No. 3 (Education Minnesota).

38. Minn. Stat. § 120B.363, subd. 1, provides that the purpose of the rulemaking would be to develop qualitative criteria for the purpose of “approving local assessments.” The legislation implicitly assumes that school districts will be responsible for the costs of any local assessment. The Administrative Law Judge must assume that the legislature was aware of this expense when it directed the Board to develop criteria for approval by the state. The legislation does not require districts to engage in the assessment process; it provides only that if a district develops an assessment process, the state must approve it for the purpose of issuing a statewide credential. The Administrative Law Judge concludes the Board has adequately addressed the costs of the rule for identifiable categories of affected parties.

39. Regarding the sixth factor, the Board identified legislative and/or financial consequences to the Board if the rule is not adopted.⁵⁰

40. Finally, the seventh factor requires the agency to assess any differences between the proposed rule and existing federal regulations and to analyze specifically the need for and reasonableness of each difference. In the SONAR, the Board described the paraprofessional requirements under NCLB as follows:

The federal No Child Left Behind law requires all paraprofessionals who serve in Title I or special education settings to meet minimum eligibility requirements. Specifically, these paraprofessionals are required to demonstrate competence in one of three ways:

1. Two years of study at an institution of higher education; OR
2. An Associate’s degree (or higher); OR
3. A demonstration, through a formal state or local academic assessment:
 - a. knowledge of and the ability to assist in instructing reading, writing, and math;OR
 - b. knowledge of and the ability to assist in instructing reading readiness, writing readiness, and math readiness.⁵¹

41. Based on its assessment of the NCLB requirements, the Board concluded that the proposed rule is not in conflict with NCLB or any other federal regulations.⁵² A number of commenters disagreed, arguing that the SONAR

⁵⁰ SONAR at 5.

⁵¹ *Id.* (emphasis added).

⁵² *Id.*

inaccurately describes the differences between this rule and federal requirements. Nan Records, Director of Special Education for the Sherburne/Northern Wright Special Education Cooperative (Sherburne/Northern Wright SEC), pointed out that NCLB requirements apply only to paraprofessionals hired with Title I funds or employed in a Title I schoolwide program who assist with instruction, not to all paraprofessionals in special education settings.⁵³ Depending on the program or building, there could be a distinct difference in the qualifications of Title I paraprofessionals and other paraprofessionals who are currently employed in school districts. Title I paraprofessionals typically are paid at a higher rate than other paraprofessionals because they meet NCLB requirements.

42. The St. Cloud Area School District 742 SEO similarly objected to the Board's description of NCLB and special education requirements for paraprofessionals.⁵⁴ That district also pointed out that under 34 C.F.R. §300.156 (a regulation adopted pursuant to the Individuals with Disabilities Education Act (IDEA)), the state must establish qualifications for paraprofessionals that are "consistent with any State approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services."⁵⁵

43. Many commentators argued that this proposed rule "far exceeds" the requirements of NCLB in establishing the nine areas of competency, which they maintain are not necessary.⁵⁶

44. The SONAR repeats the error contained in the Trajectory, which assumes that all special education paraprofessionals are currently required to meet the requirements of NCLB. The Board acknowledged and apologized for its misstatement regarding the scope of NCLB requirements, saying it should have stated that many school districts have already applied NCLB requirements to all special education paraprofessionals. The Board noted that "the proposed rule language does not reflect this error, and the misstatement in the SONAR should not have a bearing on the determination of whether the proposed rule is needed and reasonable."⁵⁷

45. The statute requires the Board to implement a statewide credential by adopting qualitative criteria for approving local assessments "that include an evaluation of a paraprofessional's knowledge of reading, writing, and math and the paraprofessional's ability to assist in the instruction of reading, writing, and math." The statute does not limit the credential to those areas. Furthermore,

⁵³ Testimony of Nan Records; Posthearing Comment No. 4 (Sherburne/Northern Wright SEC). See also 20 U.S.C. § 6319(c); 34 C.F.R. § 200.58

⁵⁴ Posthearing Comment No. 13 (St. Cloud Area School District 742 SEO).

⁵⁵ *Id.*

⁵⁶ Posthearing Comment Nos. 5, 7, 8, 9, 12, 14, 16, 18, 21, 22.

⁵⁷ Board Reply at 3.

because the specific criteria to establish competency in these areas are not yet developed, it is hard to say that the rule conflicts with federal law. As implemented in any given school district, an assessment might exceed the requirements of NCLB, or it might not. The Administrative Law Judge concludes that the Board has adequately assessed any differences between the proposed rule and existing federal regulations.

B. Performance-Based Regulation

46. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

47. The Board maintained that “in developing the proposed rule, [the Board] considered and implemented performance-based standards that emphasize superior achievement in meeting the Board’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.” The assertion is supported by the Board’s contention that “the proposed rule relies on core competencies, which were developed by the MN Department of Education. According to our stakeholders, these competencies reflect best practice for paraprofessionals.”⁵⁸

48. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

C. Consultation with the Commissioner of Finance

49. Under Minn. Stat. § 14.131, the agency is required to “consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

50. On December 13, 2007, the Board submitted the rule to the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government.⁵⁹ The Department of Finance provided comments in a memorandum dated December 14, 2007.⁶⁰

51. In reviewing the proposed rules and SONAR, the Department of Finance noted that the Board’s earlier draft of the rules had been vigorously

⁵⁸ SONAR at 5.

⁵⁹ SONAR, at 9.

⁶⁰ Ex. R.

opposed due to the possible impact on salaries of credentialed paraprofessionals. With the lack of detail in the proposed rule, the Department of Finance could not determine the magnitude of costs that could be incurred by local units of government in administering their responsibilities under the rule. Similarly, the Department of Finance could not determine the magnitude of any impact that might arise from the application fee, in the event that school districts chose to cover that fee for employee applicants. The Department of Finance concluded that the proposed rules will have a fiscal impact on local units of government, but the magnitude of the impact is unknown.⁶¹

52. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 to consult with the Commissioner of Finance.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

53. Under Minn. Stat. § 14.127, the Board must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁶² The Board is obligated to make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶³

54. In the SONAR, the Board indicated that it has determined the cost of complying with the proposed rules in the first year will not exceed \$25,000 for any small business or small city. The basis for the Board’s determination was not explained.⁶⁴

55. While there was no description of the reasons for the Board’s conclusion, the Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.127 and approves that determination. There have been concerns raised in this rulemaking proceeding relating to costs associated with the rules, but they do not appear to affect the entities in Minn. Stat. § 14.127. The concerns regarding costs are further discussed below.

VII. Rulemaking Legal Standards

56. Under Minnesota law,⁶⁵ one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative

⁶¹ *Id.*

⁶² Minn. Stat. § 14.127, subd. 1.

⁶³ Minn. Stat. § 14.127, subd. 2.

⁶⁴ SONAR at 9.

⁶⁵ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.⁶⁶ The Board prepared a SONAR⁶⁷ in support of its proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Board staff and supporting witnesses at the public hearing, and by the Board's written post-hearing submission.

57. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.⁶⁸ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁶⁹ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁷⁰ The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."⁷¹

58. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.⁷²

59. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with the rule adoption procedure, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.⁷³

60. Because the proposed rules were changed after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially

⁶⁶ *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁶⁷ Board Ex. Q.

⁶⁸ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

⁶⁹ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁷⁰ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

⁷¹ *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d at 244.

⁷² *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁷³ Minn. R. 1400.2100.

different from that which was originally proposed.⁷⁴ The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if “the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.” In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests,” whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

VIII. Analysis of the Proposed Rules

57. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

58. The Administrative Law Judge has found that core portions of the proposed rule are defective and that those defects cannot be cured through new language that would not constitute substantially different language from that originally published in the *State Register*. These defects prevent the rule from being adopted, absent initiating a new rulemaking proceeding. To assist the Board in such a future proceeding, the Administrative Law Judge has analyzed the rule for an affirmative presentation of facts and the demonstration of the need for and reasonableness of all rule provisions. Findings of need and reasonableness and suggested changes to the rule are for the purpose of adopting the rule in a subsequent proceeding, not for curing the defects in the rule for adoption through this proceeding.

IX. Rule-by-Rule Analysis

Subpart 1 – In General

⁷⁴ This analysis is also required due to the Findings of defects in the proposed rules.

59. Subpart 1 of proposed rule 8710.9000 describes the overall scope of the education paraprofessional credential program. Based on a comment received, the Board clarified that the credential was not a State requirement. The language of the subpart, as modified by the Board, states:

Subpart 1. In general. The Board of Teaching shall grant a credential, which is not considered a license, to applicants who meet all requirements of this part. An applicant must provide evidence of satisfactory demonstration of the nine core competencies listed in subpart 4. A credential is valid on the date issued by the Department of Education and does not expire. Submission of an application for a paraprofessional credential is voluntary and is not a state requirement for employment.

60. The Board emphasized at the hearing that the credential is not a license and that the Board would not conduct any ongoing oversight of paraprofessionals under this rule. Anoka-Hennepin, which currently employs 584 “para-educators,” questioned whether a credential for paraprofessional staff was needed.⁷⁵ The adoption of a credential, however, is expressly directed by the Legislature. There is no further demonstration of need required of the Board for the overall proposition that a system of credentialing for paraprofessionals is to be adopted by rule. Specific provisions must be shown to be needed and reasonable, but the Legislature has determined that a credential process is necessary. The language above would be needed and reasonable.

Subpart 2 – Scope of Practice

61. As originally proposed, subpart 2 provided that the credential is recognition by the state that a paraprofessional has “demonstrated advanced training and preparation” to assist a licensed teacher in providing student instruction for any state or federally-funded birth through grade 12 programs. MASE objected to this language, stating:

Recognition of advanced training and preparation is not required by Minnesota Session Laws 2007, Chapter 146. It appears that the rule should be focused upon the identification of a basic standard for paraprofessional competency rather than recognition of advanced training. Again the rule exceeds or expands upon what would be considered necessary and reasonable.⁷⁶

62. In light of the controversy over the impact of the credential, the Board proposed subpart 2, to clarify what the process would mean to a credential holder. The Board modified the subpart by the time of the hearing to state:

⁷⁵ Posthearing Comment No. 6 (Anoka-Hennepin).

⁷⁶ Posthearing Comment No. 15 (MASE).

Subp. 2. Scope of practice. A paraprofessional holding a credential under this part is recognized by the state of Minnesota as having demonstrated training and preparation in competencies consistent with Subpart 4 to assist a licensed teacher in providing student instruction for any state and federally funded birth through grade 12 programs including transition programs.

63. Removing the reference to advanced training meets the objections raised. The new language would be needed and reasonable and not substantially different from that published in the *State Register*.

Subparts 3, 4, 5 and 6 – Credential Requirements, Competencies, and Procedures

64. The Board set out the process requirements for issuance of a credential in subpart 3, which provides:

Subp. 3. **Credential requirements.** A candidate for a paraprofessional credential must demonstrate:

- A. the nine competencies in subpart 4; and
- B. passing of a state-approved examination in reading, writing, and mathematics for paraprofessionals.

65. In subpart 4, the Board proposed to adopt the following as the standards for the education paraprofessional credential:

Subp. 4. **Competencies.** A candidate for a paraprofessional credential under subpart 3 must demonstrate knowledge and/or skill competence to assist and support a licensed teacher in items A to I:

- A. competency 1: philosophical, historical, and legal foundations of education;
- B. competency 2: characteristics of students;
- C. competency 3: assessment, diagnosis, and evaluation;
- D. competency 4: instructional content and practice;
- E. competency 5: supporting the teaching and learning environment;
- F. competency 6: managing student behavior and social interaction skills;

- G. competency 7: communication and collaboration partnerships;
- H. competency 8: professionalism and ethical practices; and
- I. competency 9: academic instructional skills in reading, writing, and mathematics.

61. Daryl Miller, President of Minnesota Administrators for Special Education (MASE) objected to the characterization of the NCLB requirements, stating:

The SONAR identifies the standard for highly qualified under NCLB but does not provide any justification for the overly expansive list of competencies required as part of this credential. The analysis of the need for each element of the competencies provides comment on some nice to know information but not on the need for the competencies as determined by employers. There is no need identified through data collected from the local school Districts for a credential with this level of complexity. If adopted this credential could be argued by consumers to be the base level of qualifications for all paraprofessional[s] thus creating conflicts between parents and school districts.⁷⁷

66. The Rum River Coop and Thomas Ambrasas, Special Education Director for the Spring Lake Park School District 16, also noted that the scope of the credential provision greatly exceeded the actual competency needs for most paraprofessional positions in a school district.⁷⁸

67. Jackie McCormick, Senior Advocate of ARC Greater Twin Cities (ARC Greater Twin Cities), expressed support of the proposed competencies. ARC Greater Twin Cities proposed adopting an additional competency to address needs in special education and education of students with disabilities. ARC Greater Twin Cities suggested a number of specific areas within that category be adopted as standards for that competency.⁷⁹

68. The SONAR describes the reasons for including each of the nine competencies in the credentialing process as follows:

This subpart identifies the nine specific competency areas in which a paraprofessional must demonstrate advanced training and preparation. The competencies were developed by Minnesota educators through a review of the research and literature, analysis of statements from professional organizations regarding the role of

⁷⁷ Posthearing Comment No. 15 (MASE).

⁷⁸ Posthearing Comment Nos. 20 and 22.

⁷⁹ Testimony of McCormick.

paraprofessionals, and input from a variety of Minnesota constituents, including: administrators, teachers, paraprofessionals, representatives from higher education, representatives from unions and professional organizations, parents, and others. The competencies represent the core knowledge and skills competencies for paraprofessionals who work in instructional roles with students in Minnesota schools.⁸⁰

69. The statute permits the Board to determine the specific competencies to be established for the credential, as long as the requirements include instructional skills in reading, writing, and mathematics. The Board has adequately supported the category areas in which competencies must be demonstrated. The Board has the discretion to choose among possible approaches, as long as the choice made is rational. The decision to establish these categories of competency is within the Board's legitimate discretion to make policy. To this extent, the rule would be needed and reasonable.

70. The Board explicitly declined to advance its own process for applicants to demonstrate core competencies for obtaining a credential. Instead, the Board proposed to have the process developed by individual school districts or other entities. The manner in which this was to be carried out was set out in proposed subpart 5, which states:

The validation of an applicant's demonstration of the nine core competencies under Subp. 4 must be performed through a process established locally, regionally or by a consortium of districts. The process for assessment may accept multiple types of experiences and information including academic coursework, professional development and training experiences, workshops, work experiences, examinations, and other professional activities.

71. Proposed subpart 6 sets out the mechanism for applying for and obtaining an educational paraprofessional credential. The proposed rule states:

An applicant for a paraprofessional credential must:

- A. complete a local process of assessment that is approved by the commissioner of the Department of Education;
- B. submit an application for a credential including the official verification from a state-approved entity that the applicant has met requirements under subpart 3.

An application for the issuance of a paraprofessional credential must be accompanied by a processing fee.

⁸⁰ SONAR at 6-7.

72. Speaking in support of the rules, Richard Herriges of Education Minnesota described the rules as enabling a variety of approaches that could evolve through a labor-management negotiation process. He acknowledged that the rule did not require such an approach to develop the specific standards that remain unidentified in the rule.⁸¹

73. Teri Wallace of the University of Minnesota described the approach taken in an earlier draft of the proposed rules, which identified much more specific requirements. Wallace described a number of tools as being available for implementing the demonstration of competencies. Foremost among these tools is Para eLink, a website describing core and specialty competency areas, providing tutorials, and acting as a clearinghouse of resources in the area of education paraprofessional instruction.⁸² Wallace also identified portfolios as a tool for demonstrating competencies. Wallace did not identify any specific criteria that are required under the rule as proposed.⁸³

74. Speaking on behalf of the proposed rules, Trudy Hervey stated that the rules had “specifics on what is enough.”⁸⁴ The commentator noted that the rule allows the paraprofessional and each district to define their own structure for meeting the credential requirement. Hervey acknowledged that the specific information for each standard was not in the rule, but maintained that this information was readily available on a number of websites. This approach was taken to allow local school districts to “fill in the blanks.”⁸⁵

75. A number of commenters objected to the proposed rule as being too vague and undefined to implement, difficult to administer, and lacking in any standards for determining which assessments will be approved or disapproved.⁸⁶ Waseca APS noted that the Board’s proposed process would result in a credential that is state-issued, but the standards for which could vary significantly from one district to the next.⁸⁷ Anoka-Hennepin questioned how the nine competency areas were to be translated into consistent demonstrations that would ensure skills are held by certification holders. It asserted that the competencies are meaningless without more specific standards.⁸⁸ Mid-State questioned how much training would be required to demonstrate a competency, and who would be qualified to conduct the training. Mid-State also noted the lack of criteria that are needed to assess the desired level of competency in an applicant.⁸⁹

⁸¹ Testimony of Herriges.

⁸² The Para eLink site is located at <http://ici2.umn.edu/mlink/>.

⁸³ Testimony of Wallace.

⁸⁴ Testimony of Hervey.

⁸⁵ *Id.*

⁸⁶ Posthearing Comment Nos. 5, 6, 10, 13, 15, and 19.

⁸⁷ Posthearing Comment No. 9 (Waseca APS).

⁸⁸ Posthearing Comment No. 6 (Anoka-Hennepin).

⁸⁹ Posthearing Comment No. 19 (Mid-State).

76. In response to these comments, the Board asserted that the use of broad competency statements “would allow school districts and charter schools to develop (or recognize) targeted trainings that relate most appropriately to their student populations and overarching goals.” It maintained that the list of competency categories is “specific enough to ensure that any paraprofessional who earns a credential will have a common foundation of knowledge and understanding, but also flexible enough to allow school districts and charter schools to tailor their trainings to address their unique situations and needs.” It further contended that the more specific sub-competencies contained in a previous draft of the rule will “serve as a valuable resource and will be available from the Minnesota Department of Education for districts or charter schools.”⁹⁰

77. The Board’s statutory obligation is to adopt “qualitative criteria for approving local assessments that include an evaluation of a paraprofessional’s knowledge of reading, writing, and math and the paraprofessional’s ability to assist in the instruction of reading, writing, and math.”⁹¹ These are the criteria that the Commissioner of Education must use in approving local assessments.

78. The rule as proposed is both inconsistent with the statutory directive to adopt qualitative criteria and unreasonably vague. The dictionary defines “criteria” as “standard[s] on which a judgment or decision may be based.”⁹² Subpart 4 sets out categories of competency, but neither subpart 4 nor subpart 5 contain any standards for demonstrating those competencies, or any standards that the Commissioner must use in approving or disapproving any local assessment.⁹³ Because of the complete absence of standards for local processes, any decision to approve such a process would be an exercise of the Commissioner’s will, not the exercise of reasoned judgment. And the Board cannot rely on the more specific provisions of a draft rule not proposed in this proceeding to provide the standards to guide the Commissioner’s approval authority, whether or not the Department makes those standards somehow available to the public. The Board’s obligation under the statute is to adopt those standards by rule.

79. The absence of the standards for successfully demonstrating competence in these areas is a fatal defect in the proposed rule. Moreover, the Board cannot propose actual criteria at this stage of the rulemaking proceeding without the proposed rule being substantially different from the rule as published

⁹⁰ Board Reply at 3.

⁹¹ Minn. Stat. § 120B.363, subd. 1.

⁹² Merriam-Webster Online Dictionary (<http://www.merriam-webster.com/dictionary/criteria>).

⁹³ A good example of the sort of rule language that would meet the statutory requirement is found at Minn. Rule 8710.2000 (<https://www.revisor.leg.state.mn.us/rules/?id=8710.2000>, Standards of Effective Practice for Teachers). That rule sets out categories of knowledge and skills which candidates for teacher licensure must demonstrate. The difference is that each category contains a general standard that must be met and a list of specific competencies that must be demonstrated. The Board’s proposed rule for paraprofessional credentialing lacks even the overall standard that is present in the teacher licensure rule. Moreover, the teacher licensing rule contains specific standards for the approval of a teacher preparation program in part 8710.7600.

in the State Register. The only option available to the Board that is consistent with Minn. Stat. Chapter 14 is to withdraw this rule and begin anew.

80. As the Board pointed out at the hearing, the organization of core competencies described at the Para eLink website parallels the order and descriptions of categories in subpart 4. But the rule does not incorporate the content of the Para eLink website to establish the standards necessary for certification. If it were the Board's intent to incorporate the content of that website, there would need to be a recitation of that content in the proposed rule and supporting facts set out in the Board's SONAR. That approach would allow public input into the particular criteria being proposed for adoption in the rulemaking proceeding. Because these actions were not taken and no opportunity for public input was afforded, the Board cannot substitute the website's content for its own rule at this point in the rulemaking process.

81. Nor does subpart 5 provide any mechanism for a local district or other entity to obtain approval from the Board of its core competency assessment, or any guidance for how the state will decide to approve or disapprove an examination, which is a necessary requirement for the credential.⁹⁴ This is also inconsistent with Minn. Stat. § 120B.363, subd. 1, which requires that the commissioner approve or disapprove local assessments using the criteria developed by the Board. In addition, it is unreasonably vague. How would a district go about submitting its assessment process for approval? How long would the Commissioner have to approve or disapprove the assessment? What is the effect of disapproval? The proposed rule language is defective, and the defects cannot be cured in this proceeding.

82. The Board can cure the defects in this rule only by adopting criteria for what constitutes competency in whatever areas the Board determines are important. With such criteria, the Board could then propose to allow any local district or consortium of districts to develop a process for establishing that these criteria are met. The rule would need to specify how the local district or consortium obtains approval of its process from the Commissioner.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Teaching (Board) gave proper notice in this matter.

2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

⁹⁴ MASE noted that no procedures are contained in the rule regarding how an application is to be submitted. See Posthearing Comment No. 15.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted in Findings 78, 79, and 81.

4. The Board has not demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50, particularly as noted in Findings 78, 79, and 81.

5. The additions and amendments to the proposed rules that would be required to correct the defects identified above would result in language that is substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 to assist the Board in a future rulemaking.

7. Due to Conclusions 3, 4, and 5, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, but the Board cannot adopt its proposed rule in this rulemaking proceeding.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules not be adopted.

Dated: May 5, 2008.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY

Administrative Law Judge

Recorded: Digitally Recorded; No Transcript Prepared.

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules.

The Administrative Law Judge has determined that the defects in the proposed rules cannot be corrected without the rules being substantially different from those originally published in the *State Register*. If these determinations are upheld by the Chief Administrative Law Judge, these rules cannot be adopted and Board must initiate a new rulemaking proceeding to adopt the rules.